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Supreme Court, U.S.

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NO. \_\_\_\_\_

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1987

GER-SHEP, INC., KLP, INC., THEODORE W. SCHELL,  
MCMINN'S ASPHALT CO., INC., MCMINN'S ASPHALT  
PRODUCTS, INC. and JEFFREY G. SWEIGART,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION**

**For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Third Circuit**

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### **Questions Presented For Review**

1. Should not a writ of certiorari issue to review judgments by the Court of Appeals for the Third Circuit affirming convictions in a criminal antitrust case in which the jury was improperly instructed that the government did not have to prove any nexus between a wholly intrastate activity and interstate commerce, thus removing an essential element of the case from the jury's consideration?

2. Should not a writ of certiorari issue to review judgments by the Court of Appeals for the Third Circuit affirming convictions in a criminal antitrust case upon evidence which is equally consistent with lawful activity and which would not have survived a motion for summary judgment against a plaintiff in a civil action under the same statute?

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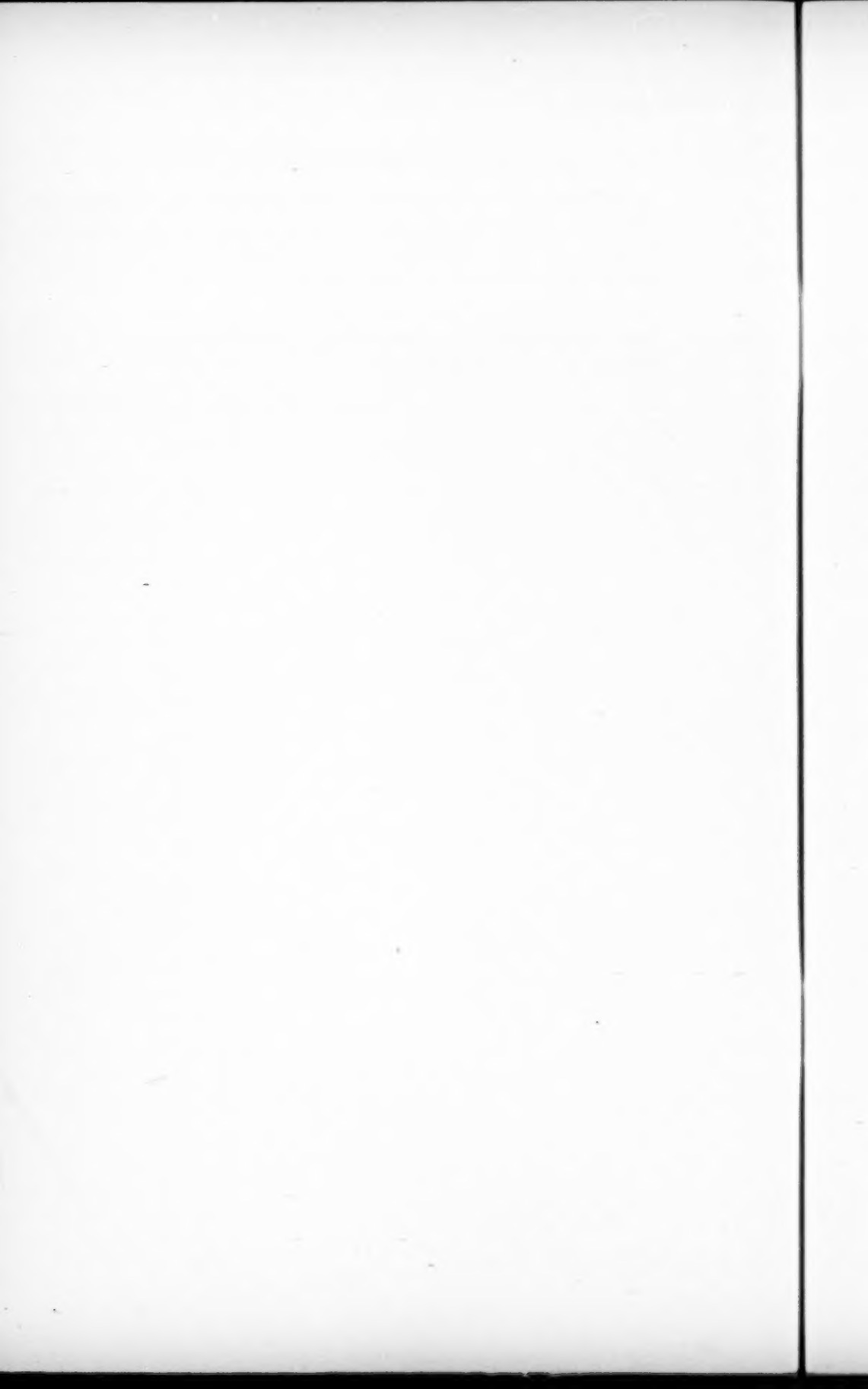
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### **Parties Below**

Pursuant to Supreme Court Rule 19.4, all codefendants at trial and on appeal below join in this Petition. Following the conviction of defendants, their appeals were consolidated before the Court of Appeals for the Third Circuit which affirmed the conviction of appellants by judgment order. A joint petition for rehearing on behalf of all was denied.



IN THE  
**SUPREME COURT OF THE UNITED STATES**

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October Term, 1987

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GER-SHEP, INC., KLP, INC., THEODORE W. SCHELL,  
MCMINN'S ASPHALT CO., INC., MCMINN'S ASPHALT  
PRODUCTS, INC. and JEFFREY G. SWEIGART,  
*Petitioners,*

*v.*

UNITED STATES OF AMERICA,  
*Respondent.*

---

**PETITION**  
**For A Writ Of Certiorari**  
**To The United States Court Of Appeals**  
**For The Third Circuit**

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TO THE HONORABLE, THE CHIEF JUSTICE  
OF THE UNITED STATES AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF  
THE UNITED STATES:

Ger-Shep, Inc., KLP, Inc., Theodore W. Schell,  
McMinn's Asphalt Co., Inc., McMinn's Asphalt Prod-  
ucts, Inc. and Jeffrey G. Sweigart hereby petition that a  
writ of certiorari issue to the United States Court of  
Appeals for the Third Circuit to review its judgments at  
Nos. 87-1113, 1114, 1115, 1116, 1117 and 1118.

### OPINIONS BELOW

The Court of Appeals affirmed petitioners' convictions by judgment orders entered October 19, 1987, which are reproduced at A-1, *et. seq.* On November 12, 1987, a petition for rehearing was denied; that order is reproduced at A-16.

### JURISDICTION

On June 30, 1986, at the conclusion of a lengthy jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on a one-count indictment charging them with violating 15 U.S.C. §1 (The Sherman Act). After sentencing, petitioners' bail was continued pending appeal. On October 19, 1987, a panel of the Court of Appeals for the Third Circuit affirmed the convictions, and rehearing was denied on November 12, 1987. Issuance of the mandate was stayed by order dated November 25, 1987 (A-18) until January 11, 1988.

This Court's certiorari jurisdiction is established by 28 U.S.C. §1254(1).

### CONSTITUTIONAL PROVISION

The issues presented call upon this Court to construe and apply the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

"No person shall be . . . deprived of life, liberty or property, without due process of law. . . ."

## STATEMENT OF THE CASE

Petitioners are hot-mix asphalt producers who were charged with violating Section 1 of the Sherman Act (15 U.S.C. §1) by engaging in a conspiracy in unreasonable restraint of interstate commerce. The prosecution contended that the defendants agreed at annual meetings between 1978 and 1982 to allocate territories, fix prices and submit collusive bids to purchasers in Lancaster County, Pennsylvania. The defendants conceded that such meetings took place and that many industry topics were discussed, including costs, prices and competition. The defendants denied, however, that they agreed at these meetings or elsewhere to fix prices, allocate customers or rig bids.

### Facts Relevant to the Interstate Commerce Issue

The indictment alleged and the government contended at trial that the complained of activities were *both* "in the flow of" interstate commerce (interstate) and "substantially affected" interstate commerce (intrastate). The interstate commerce aspects of the case were hotly contested at trial. There was no evidence whatsoever to support the "flow of commerce" (interstate) theory; the only possible prosecution theory capable of supporting a conviction was the "substantial effect" (intrastate) theory. Even though the defendants contended there was insufficient evidence from which the jury could have found a substantial adverse effect on interstate commerce, the trial judge's erroneous instruction improperly foreclosed jury consideration of that issue and impermissibly lessened the prosecution's burden of proving each element of the offense beyond a reasonable doubt.

After deliberating for several hours, the jurors requested "clarification of the two points of violating the interstate commerce law — interstate commerce and effect." (A-19) In response to that request, the jurors

were erroneously advised that "the government is not required to prove any adverse impact on interstate commerce" under either theory. (A-20) The trial judge should have charged the jurors that they first must find that the intrastate activity had a substantial impact upon interstate commerce. Only then could they consider whether or not the complained of intrastate activities had a "not insubstantial" adverse impact upon interstate commerce. Under the instruction given, all interstate commerce aspects of the case were removed from the jury's consideration, and the prosecution was not required to prove those essential elements of the crime charged beyond a reasonable doubt. Such serious error mandates that the convictions be set aside and a new trial ordered.

### **Facts Relevant to Proof of the Sherman Act Criminal Charge**

The evidence presented by the government in this criminal case was equally consistent with lawful conduct and would have been insufficient to enable a civil plaintiff in an action under the same statute to withstand a motion for a summary judgment.

It was undisputed at trial that petitioners and other competitors met annually to discuss their common business interests and economic conditions and to exchange market information among themselves. The government contended and petitioners disputed that such meetings resulted in or constituted agreements to fix prices, allocate customers and/or rig bids. Two persons who attended some of those meetings were called as immunized witnesses at trial by the government. One of those witnesses, who attended only the last two of the four meetings, offered little more than his opinion that an accommodation among asphalt producers had been achieved at some time prior to his attendance. The remaining witness testified in such an inconsistent,

self-contradictory fashion that the government was permitted to treat him as a hostile witness on redirect examination. Faced with the prospect that this testimony would be insufficient to convict the defendants, the government resorted to circumstantial evidence in an attempt to support its claim of unlawful conspiracy. For example, the prosecution offered color-coded maps showing that certain asphalt producers usually were the successful bidders in certain townships during each of the four years of the alleged conspiracy. This was also the case, however, during many of the years prior and subsequent to the alleged conspiracy — periods when, according to the government, there was vigorous competition. Moreover, there was undisputed testimony that hot-mix asphalt could not be economically delivered more than 10 or 15 miles from its production facility; this geographic constraint is attributable to high transportation costs as well as the fact that the asphalt must be laid at a temperature of no less than 175 degrees Fahrenheit, only about 25 degrees cooler than the temperature at which it leaves the plant. Thus, the fact that a particular producer was the successful bidder in a particular municipality for a number of years is not dispositive of criminal conduct; rather it is equally consistent with the economic realities of the asphalt industry.

The government also offered evidence that during the four years of the alleged conspiracy, prices for hot-mix asphalt were between 6 and 10 percent higher in Lancaster County than prices for the same product in the five surrounding counties. However, the defense offered expert testimony establishing that, absent consideration of a myriad of cost factors, no legitimate inference could be drawn from such a price differential. Nonetheless, no attempt was made by the government to account for any other reason why such prices tended to be higher or to determine whether the same was true in the years before or after the alleged conspiracy. The

expert testimony went un rebutted. The jury was asked by the government and permitted by the trial judge to infer that an unlawful conspiracy existed simply from the fact that prices were ~~higher~~.

One piece of circumstantial evidence upon which the government relied as though it were a "smoking gun" was a typewritten list of townships and boroughs in Lancaster County to which handwritten initials had been added. Although this Court is not being asked to consider the issue of whether the list should have been admitted in evidence, the fact that it was clearly *inadmissible* cannot be disregarded in the context of the issues raised by this Petition. The initials on the list apparently represented Lancaster County asphalt producers and were in the handwriting of a producer who was deceased at the time of trial and, thus, unable to explain the meaning of his notations. Despite the fact that there was no evidence as to when or why the list was made or why the initials had been placed beside the municipalities, the trial judge admitted the list as a co-conspirator statement.<sup>1</sup> Consequently, the prosecution was allowed to argue that the list was made to record the results of a market allocation agreement. The list could just as easily have been made independently and for legitimate business reasons, such as to record which company had been the successful bidder in a particular municipality in any given year, or to denote which municipality contained or was closest to a production facility operated by one of the competitors. It is significant that the name of a borough appeared on the list, which borough had gone out of existence in 1970,

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1. The trial court, perhaps recognizing that the requisites for admission of the list as a co-conspirator statement were not shown by the government, later *sua sponte* mischaracterized the list as a business record in an attempt to justify its admission.

eight years prior to the beginning of the alleged conspiracy. Nevertheless, the jury was urged by the government and permitted by the trial judge to infer that an unlawful conspiracy existed simply because one of the alleged conspirators maintained such a list.

Moreover, petitioners presented the expert testimony of a professor from the University of Pennsylvania's Wharton School who performed a time series regression analysis of the defendants' bidding and pricing practices in years prior, during and subsequent to the alleged conspiracy. This computer study demonstrated that the pricing behavior of the defendants during the period of the alleged conspiracy was identical to their pricing behavior during several years when the government conceded there was no conspiracy at all. Thus, the expert economist testified that she could find no evidence of any action or behavior by the defendants which had the effect of raising, fixing, stabilizing or maintaining prices during the years in question. Significantly, although one of the Justice Department Anti-trust Division's staff economists was present during the defense economist's testimony and met with her for several hours after her testimony to ascertain the validity of her study, no rebuttal testimony was offered by the government to dispute her economic findings or expert opinion.

Because the evidence established only that defendants met and engaged in activity equally consistent with lawful behavior, it is clear that the proven facts would have been insufficient in a civil action under the Sherman Act to withstand a motion for summary judgment. Nevertheless, the trial judge not only permitted this criminal case to go to the jury but erroneously instructed that jury, further reducing the government's burden of proof.

## ARGUMENT

### Reasons For Granting The Writ

The instruction given by the district court conflicts with the law as enunciated by Courts of Appeals in the Seventh, Eighth and Ninth Circuits. By affirming the district court's judgment, the Court of Appeals for the Third Circuit created a conflict in the law as applied among the circuits. That conflict should be resolved by this Court.

Additionally, petitioners were convicted of criminal violations of the Sherman Act upon evidence which would not have withstood a summary judgment motion in a civil action under the same statute. The criminal convictions were based upon evidence which was equally probative of lawful business conduct. This case presents an opportunity for this Court to resolve the conflict which exists wherein the government, in a criminal proceeding under the Sherman Act, has a lesser burden of proof than a plaintiff in a civil action under the same statute in view of *Monsanto v. Spray Rite Service Corporation*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

### **I. The Prosecution's Burden Of Proof In This Criminal Antitrust Case Was Impermissibly Reduced.**

#### **A. *There Can Be No Per Se Violation Of The Sherman Act In An Intrastate or "Effect On Commerce" Case.***

The Sherman Act (15 U.S.C. §1) extends to transactions in the stream or flow of interstate commerce and to transactions which are intrastate but which substantially affect interstate commerce. The Court of Appeals for the Third Circuit has clearly enunciated the different elements which must be proved under each theory. An

"in commerce" theory requires the government to prove that: (1) a substantial volume of interstate commerce is involved with the challenged activity, and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. An "effect on commerce" theory applies to activity which is primarily intrastate. The government must show that: (1) a substantial amount of interstate commerce was involved, and (2) the challenged activity has a "not insubstantial effect" on interstate commerce. *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1192 (3d Cir. 1984).

Since the Sherman Act prohibits only *unreasonable* restraints on interstate commerce, certain kinds of activities have been deemed unreasonable *per se*. Price fixing and bid rigging are deemed *per se* violations and no further unreasonable restraint or adverse impact on interstate commerce need be shown. *Id.* That presumption applies only in "flow of commerce" cases, however, since the jurisdictional predicate of interstate commerce has otherwise been demonstrated. The presumption does not apply in intrastate or "effect on commerce" cases. *United States v. Ben M. Hogan Co., Inc.*, 809 F.2d 480, 481 (8th Cir. 1987) ("Although the *per se* instruction created a conclusive presumption that interstate commerce was affected, the jury could not even consider the *per se* instruction unless it had first found that interstate commerce had been affected."); *United States v. Bensinger Company*, 430 F.2d 584, 588-89, n.3 (8th Cir. 1970). ("Were the price-fixing to have occurred in intrastate commerce, it would be necessary to show a substantial impact upon interstate commerce."); *see also United States v. Starlite Drive-in, Inc.*, 204 F.2d 419, 422 (7th Cir. 1953) ("Neither this case nor any other, however, supports the theory advanced here that local activities are illegal simply because they concern articles which have previously moved in interstate commerce. Nor do they hold that a price-fixing agreement between

local retailers dealing in a product produced in another state is illegal in the absence of a specific showing of the effect of the conspiracy on interstate commerce.”); *Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 746 (9th Cir. 1954) (“This [*per se*] instruction fitted into the plan of instruction of the ‘in commerce’ theory. But because it stated that price fixing necessarily affected commerce it did not leave to the jury the factual question of the impact of wholly intrastate activities on interstate commerce and hence is not available as presenting the ‘affect commerce’ theory.”). *Accord Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966).

The law as set forth in the foregoing decisions was not applied at petitioners’ trial. The “effect on commerce” or intrastate theory relied on by the government required the trial judge to instruct the jurors that they must decide two issues: (1) whether the intrastate activity involved a substantial amount of interstate commerce; and (2) whether the challenged intrastate activity had a “not insubstantial effect” on interstate commerce. However, the jurors were not permitted to make those required determinations. Instead, they were erroneously instructed that the government was not required to prove *any* adverse impact on interstate commerce. Predictably, convictions resulted.

*B. Petitioners Were Convicted Without Proof Beyond A Reasonable Doubt Of Each Element Of The Offense.*

In this case, the government’s burden was impermissibly lessened and the jurors were permitted to convict appellants without even considering the necessary element of whether or not the intrastate activity had a substantial impact on interstate commerce. Needless to say, the trial judge’s instruction to the jurors in this complicated criminal antitrust conspiracy case were

predictably lengthy and complex. After deliberating for some time, the jurors sent a note to the court requesting "clarification on the two points of violating the interstate commerce law, interstate commerce and effect." (A-19) The fact that the lay jurors recognized that two aspects of interstate commerce were involved demonstrates their awareness of the substantial evidentiary issues in the case and their confusion as to the law to be applied.

Over objection, the trial judge instructed the perplexed jurors as follows:

An in-commerce theory requires that the government prove that, one, a substantial volume of interstate commerce is involved with the challenged activity, and, two, the challenged activity is an essential integral part of the transaction. It is inseparable from its interstate aspects. An effect on commerce theory applies to primarily intrastate activity. The government must show that, one, a substantial amount of interstate commerce was involved and, two, the challenged activity has a substantial effect on interstate activity.

The government may prove the connection between interstate commerce and the challenged activity through either the activities of the target of the anti-trust violation or defendant's activities.

**Because the challenged activities in this case are alleged price-fixing, bid-rigging and allocation of territories, which are by themselves determined to be unreasonable violations of the Sherman Act, if, in fact, that was what the defendants did, the government is not required to prove any adverse impact on interstate commerce.**

(A-20) (Emphasis supplied.)

This *per se* instruction must have been understood by the jury to relieve the government, *under either theory*, of any burden of proving an adverse or substantial impact on interstate commerce. The jurors were thus permitted to apply an unconstitutional, conclusive presumption of an effect on interstate commerce. Even though the court's earlier, complete instruction had been correct, the supplemental instruction, fresh in the jurors' minds, was erroneous and irreconcilably contradictory. "A reviewing court has no way of knowing which of two irreconcilable instructions the jurors applied in reaching [a] verdict." *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 1975, 85 L.Ed.2d 344 (1985).

Petitioners were denied the opportunity to have their defense considered by a properly instructed jury. Throughout the lengthy trial, the defendants had contended that there was no substantial effect on interstate commerce and that interstate commerce was not involved. The jurors' question evidenced their deep concern with this aspect of the case. "A defendant is always entitled to have his theory of the case, if it could amount to a lawful defense, fairly submitted to the consideration of the jury." *United States v. Flom*, 558 F.2d 1129, 1185 (5th Cir. 1977). Petitioners were denied that right when the jury was improperly instructed that the government did not have to prove any adverse impact on interstate commerce.

In this case, petitioners were convicted of federal criminal charges and sentenced to terms of imprisonment and fined up to \$300,000 without any finding by the jury that the challenged activity had any adverse impact or substantial effect on interstate commerce whatsoever. The jury's request for further instruction and "clarification of the two points of violating the interstate commerce law — interstate commerce and effect" conclusively proves the jurors' concern and indecision in this area. Yet, they were erroneously advised that "the government is not required to prove any

adverse impact on interstate commerce” under either theory. The trial judge should have instructed the jurors that they first must find that a substantial amount of interstate commerce was involved. Only then could they consider whether or not the complained of activities had a “not insubstantial” adverse impact upon interstate commerce. Under the instruction given, the issue of whether the government had proved both of the interstate commerce elements of the case was removed from the jury’s consideration altogether. This serious error mandates that the convictions be set aside and a new trial ordered. This Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

## **II. The Prosecution In This Criminal Antitrust Case Enjoyed A Lesser Burden Of Proof Than A Plaintiff In A Civil Action Under The Same Statute.**

This Court has not reviewed a criminal conviction under Section 1 of the Sherman Act since its 1978 decision in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). In *Gypsum*, this Court expressed concern that both civil and criminal liability was imposed by the same generalized definition of proscribed conduct under the Sherman Act. 438 U.S. at 438-39. This Court also noted that since the exchange of price data and other information among competitors does not invariably have anticompetitive effects, such exchanges of information do not constitute a *per se* violation of the Sherman Act. 438 U.S. at 440, n.16. As *Gypsum* clearly articulates, the proposition that activity falling within the “gray zone of socially acceptable and economically justifiable” business conduct is not *per se* violative of the Sherman Act. Therefore, just as the trial court’s erroneous charge foreclosed consideration of the interstate commerce question, it similarly lessened the government’s burden of proof when faced with clear evidence of arguably lawful conduct. The

clear effect of the erroneous instruction was to insure a conviction without regard to any effect on interstate commerce and without regard to the legality of the complained of activity.

Since its decision in *Gypsum* nearly ten years ago, this Court has reviewed several civil cases arising under the Sherman Act, including *Monsanto v. Spray Rite Service Corporation*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). These decisions are widely regarded as substantially increasing the civil plaintiff's burden of proof in establishing a violation of the Sherman Act. Evidence tending to exclude the possibility that the alleged antitrust conspirators acted independently is required by *Monsanto* in civil cases. *Monsanto* also embraced the economic principle that discussion between competitors was not itself probative of unlawful conduct even when followed by conduct further suggesting that an agreement in restraint of trade had been reached by the parties (the termination of a price-cutting distributor). Similarly, evidence showing that an inference of an antitrust conspiracy is reasonable in light of competing inferences of independent action by the competitors was required by *Matsushita*. 106 S.Ct. at 1354. Moreover, the *Matsushita* Court sanctioned the use of summary judgment to dispose of civil claims of unlawful conduct which are equally explained by the economic realities of the marketplace or which are not supported by persuasive evidence.

This case presents an opportunity to review a criminal conviction under the Sherman Act upon evidence which would have been insufficient to allow a civil plaintiff to withstand summary judgment under *Monsanto* and *Matsushita*. Like *Gypsum*, this case involves discussion and exchanges of information among competitors. The defendants admitted that such discussions

took place but maintained that they never *agreed* to any plan or program to fix prices, allocate customers or rig bids. In support of their defense, petitioners offered expert testimony demonstrating that the pricing behavior of the defendants during the period of the alleged conspiracy was identical to their pricing behavior during several years when the government conceded there was no conspiracy at all. No rebuttal testimony was offered by the government to dispute these economic findings or the expert opinion.

Instead, the government relied largely upon circumstantial evidence to support its claim of unlawful conspiracy. (See Statement of the Case, *supra*, pp. 4-7.) This circumstantial evidence, however, was equally consistent with lawful economic behavior. For example, the information compiled in the form of color-coded maps was equally consistent with the economic realities of the marketplace as it was with unlawful behavior. The mere fact that prices were higher in Lancaster County than in surrounding counties was fully explainable by a number of economic factors, such as labor costs, production costs, tax rates and numerous other variables which the government did not even attempt to negate. The "dead man's list" of initialed municipalities required speculation to decipher and well could have been created for a legitimate business purpose.<sup>2</sup>

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2. This evidence was facially unreliable to support the government's argument that the list was a written memorial of an unlawful customer allocation conspiracy beginning in 1978 and ending in 1982. Although the admissibility of this type of evidence has recently been addressed by the Court in *Bourjaily v. United States*, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 2775, \_\_\_\_ L.Ed.2d \_\_\_\_ (1987), we submit that under the particular facts of this case the list raises substantial concerns under the Confrontation Clause even if it had technically qualified as an exception to the hearsay rule, which petitioners contend it did not. See *Lee v. Illinois*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986).

Petitioners respectfully suggest that none of the circumstantial evidence excludes the possibility that the competitors acted independently, as *Monsanto* requires, or constitutes persuasive evidence of concerted action in light of the economic realities of the marketplace, as required by *Matsushita*. We submit that the Court should review this case in order to determine whether the standard in civil actions under the Sherman Act has become more stringent than that being applied by the courts in criminal cases arising under the same statute. This, of course, would be contrary to fundamental principles of jurisprudence as well as to the concerns expressed by this Court almost ten years ago in *Gypsum*.

Criminal antitrust cases should receive at least the same careful scrutiny by this Court as civil antitrust actions have recently received. The trial judge's mechanistic application of appellate language in this criminal case, without regard for the circumstances or nature of the challenged activity, resulted in a denial of due process to petitioners. The supplemental *per se* instruction not only removed the interstate commerce element from the case, it precluded the application of the "rule of reason" doctrine as required by *Gypsum* and foreclosed an acquittal in the face of evidence equally indicative of lawful business activity. Under this Court's recent guidance in *Monsanto* and *Matsushita*, those results could not have occurred in a civil context. The prosecution in a criminal antitrust action must not be afforded a lesser burden than the plaintiff in a civil action under the same federal statute.

## CONCLUSION

Petitioners' convictions were obtained by denying them due process of law. The interstate commerce element was not established, and the government enjoyed a lesser burden as a result of the erroneous jury instruction. Moreover, in this criminal antitrust case, the government's burden of proof was less than that of a plaintiff in a civil action under the same statute. For these reasons, the convictions obtained upon circumstantial evidence equally consistent with innocence should be reversed and a new trial granted.

Respectfully submitted,

*Rich A. Sprague*

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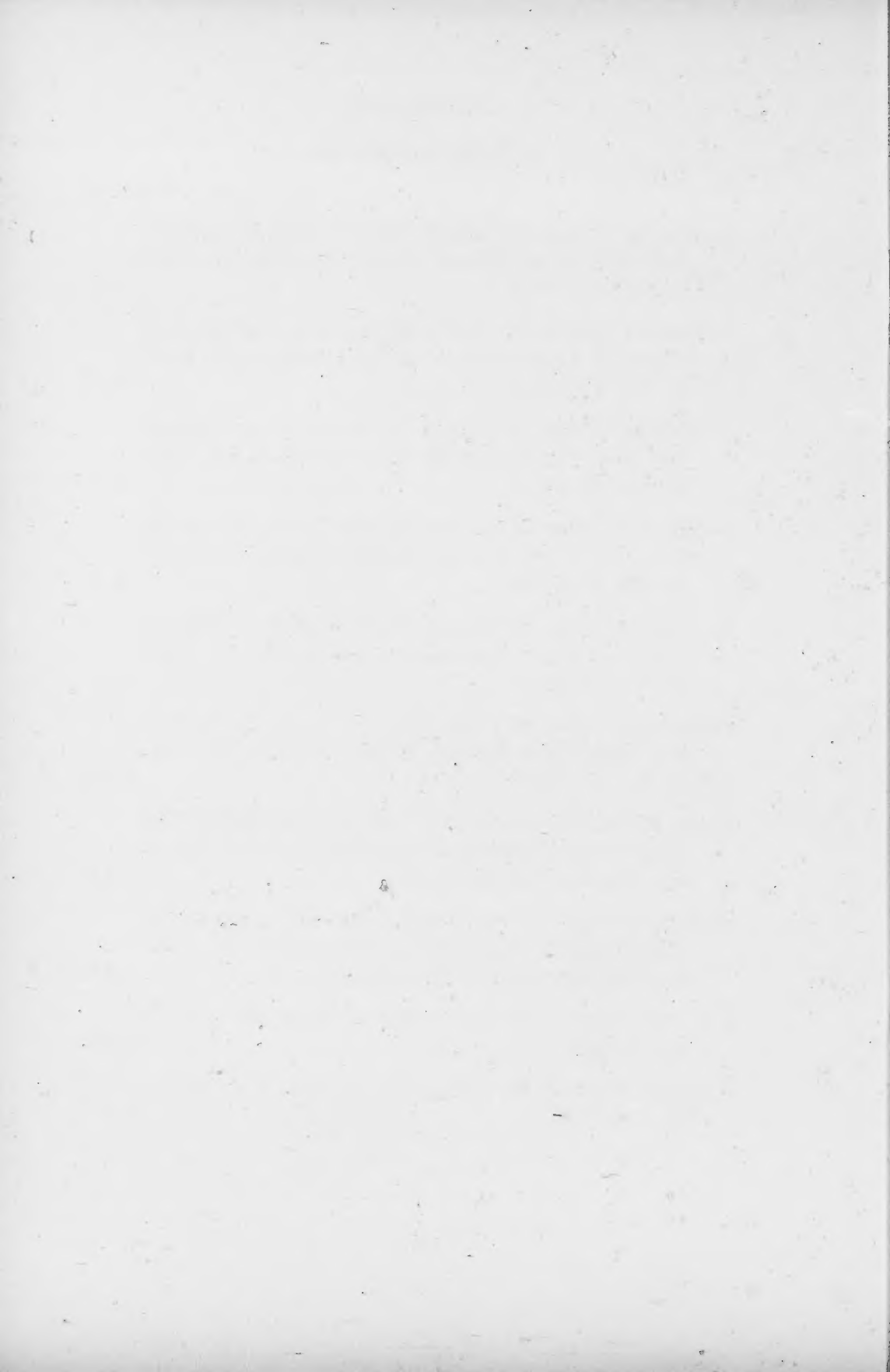
## **APPENDIX**



# APPENDIX

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 87-1113

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UNITED STATES OF AMERICA

*v.*

GER-SHEP, INC.,

*Appellant*

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-02)

District Judge: Honorable Edward N. Cahn

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Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and  
COHILL, \* *District Judge*.

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**JUDGMENT ORDER**

After consideration of all contentions raised by appellant, to wit:

(1) that there was insufficient evidence upon which a jury could properly have returned verdicts of guilty;

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\* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that the government failed to prove beyond a reasonable doubt the existence of a continuing conspiracy;

(3) that the trial court erred in admitting government exhibits 207A and B, as there was no evidence that the statements were made or documents created during the course of the conspiracy;

(4) that the testimony of James Carr was erroneously admitted against Theodore W. Schell;

(5) that because government exhibits 220 through 228 had slight probative value at best, and because they were extremely prejudicial to the defendants, the trial court erred in admitting them;

(6) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

(7) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(8) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(9) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

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(10) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of the law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 87-1114

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UNITED STATES OF AMERICA

*v.*

KLP, INC.,

*Appellant*

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-03)

District Judge: Honorable Edward N. Cahn

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Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and  
COHILL,\* *District Judge*.

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**JUDGMENT ORDER**

After consideration of all contentions raised by appellant, to wit:

(1) that there was insufficient evidence upon which a jury could properly have returned verdicts of guilty;

---

\* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that the government failed to prove beyond a reasonable doubt the existence of a continuing conspiracy;

(3) that the trial court erred in admitting government exhibits 207A and B, as there was no evidence that the statements were made or documents created during the course of the conspiracy;

(4) that the testimony of James Carr was erroneously admitted against Theodore W. Schell;

(5) that because government exhibits 220 through 228 had slight probative value at best, and because they were extremely prejudicial to the defendant, the trial court erred in admitting them;

(6) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

(7) that government exhibit GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(8) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(9) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal rules of Evidence;

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(10) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 87-1115

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UNITED STATES OF AMERICA

v.

MCMINN'S ASPHALT CO., INC.,

*Appellant*

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-05)

District Judge: Honorable Edward N. Cahn

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Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and  
COHILL,\* *District Judge*.

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**JUDGMENT ORDER**

After consideration of all contentions raised by appellant, to wit;

(1) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

---

\* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(3) that government exhibits GX-220 - GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(4) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(5) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of the law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 87-1116

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UNITED STATES OF AMERICA

v.

McMINN'S ASPHALT PRODUCTS, INC.,

*Appellant*

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-06)

District Judge: Honorable Edward N. Cahn

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Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and  
COHILL,\* *District Judge*.

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**JUDGMENT ORDER**

After consideration of all contentions raised by appellant, to wit:

(1) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

---

\* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(3) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(4) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(5) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of the law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 87-1117

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UNITED STATES OF AMERICA

*v.*

THEODORE W. SCHELL,

*Appellant*

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 86-00010-07)

District Judge: Honorable Edward N. Cahn

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Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and  
COHILL,\* *District Judge*.

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**JUDGMENT ORDER**

After consideration of all contentions raised by appellant, to wit:

(1) that there was insufficient evidence upon which a jury could properly have returned verdicts of guilty;

---

\* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that the government failed to prove beyond a reasonable doubt the existence of a continuing conspiracy;

(3) that the trial court erred in admitting government exhibits 207A and B, as there was no evidence that the statements were made or documents created during the course of the conspiracy;

(4) that the testimony of James Carr was erroneously admitted against Theodore W. Schell;

(5) that because government exhibits 220 through 228 had slight probative value at best, and because they were extremely prejudicial to the defendant, the trial court erred in admitting them;

(6) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

(7) that government exhibit GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(8) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(9) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

A-13

(10) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 87-1118

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UNITED STATES OF AMERICA

*v.*

JEFFREY G. SWEIGART,

*Appellant*

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

– (D.C. Crim. No. 86-00010-08)

District Judge: Honorable Edward N. Cahn

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Argued October 5, 1987

Before: WEIS and STAPLETON, *Circuit Judges*, and  
COHILL,\* *District Judge*.

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**JUDGMENT ORDER**

After consideration of all contentions raised by appellant, to wit:

(1) that the government failed to prove the existence of a single, continuing conspiracy as charged in the indictment, resulting in a variance, prejudicing substantial rights of appellants and requiring reversal;

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\* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

(2) that government exhibits GX207A and B were improperly admitted into evidence over the objection of counsel for defendant and in violation of Federal Rules of Evidence 403, 801, 803 and the Confrontation Clause of the United States Constitution;

(3) that government exhibits GX-220 — GX-228 were improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 802 of the Federal Rules of Evidence and the Confrontation Clause of the United States Constitution;

(4) that the testimony of government witness James Carr was improperly admitted into evidence over the objection of defense counsel and in violation of Rules 403 and 404 of the Federal Rules of Evidence;

(5) that the defendant was prejudiced by the district court's refusal to instruct the jury in accord with correct statements of law; it is

ADJUDGED AND ORDERED that the judgment of the district court entered February 26, 1987 be and the same is hereby affirmed.

BY THE COURT,

/s/ WEIS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Clerk

Date: October 19, 1987

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 87-1113/14/15/16/17/18

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UNITED STATES OF AMERICA

*v.*

GER-SHEP, INC., *et al.*

Ger-Shep, Inc.,  
*Appellant in No. 87-1113*

KLP, Inc.,  
*Appellant in No. 87-1114*

McMinn's Asphalt Co., Inc.,  
*Appellant in No. 87-1115*

McMinn's Asphalt Products, Inc.,  
*Appellant in No. 87-1116*

Theodore W. Schell,  
*Appellant in No. 87-1117*

Jeffrey G. Sweigart,  
*Appellant in No. 87-1118*

(D.C. Crim. No. 86-00010)

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**SUR PETITION FOR REHEARING**

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, and HUTCHINSON, *Circuit Judges*, and COHILL, \* *District Judge*.

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\* The Honorable Maurice B. Cohill, Jr., Chief Judge of the United States District Court for the Western District of Pennsylvania, who sat by designation, is limited to rehearing before the original panel.

The joint petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the joint petition for rehearing is denied.

BY THE COURT,

/s/ WEIS

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*Circuit Judge*

DATED: November 12, 1987

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

*Nos. 87-1113, 87-1114 & 87-1117*

U.S.A. vs. Ger-shep, Inc., Appellant, 87-1113

U.S.A. vs. KLP, Inc., Appellant, 87-1114

U.S.A. vs. Schell, Theodore, Appellant, 87-1117

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 11, 1988.

/s/ WEIS

*Circuit Judge*

DATED: November 25, 1987

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

*Nos. 87-1115, 87-1116 & 87-1118*

U.S.A. vs. McMinn's Asphalt Co., Appellant in 87-1115

U.S.A. vs. McMinn's Asphalt Products, Appellant in 87-1116

U.S.A. vs. Sweigart, Jeffrey G., Appellant in 87-1118

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 11, 1988.

/s/ WEIS

*Circuit Judge*

DATED: November 25, 1987

(Excerpt From Trial Transcript of June 25, 1986 at pages 81-82)

THE COURT: We have a question from the jury. Our practice is prescribed by directives from higher courts which instruct us to go over the question with you, suggest input from you as to how to respond to the question, then call the jury in, I'll give them my answer, you'll then have an opportunity to take exceptions to the answer I give and then the jury will be sent back to deliberate.

Does everybody agree to the procedure?

MR. DeSTEFANO: Yes.

MR. PANEK: Fine, Your Honor.

THE COURT: The question is we the jury would like clarification on the two points of violating the interstate commerce law. Interstate commerce and effect.

(Excerpt From Trial Transcript of June 25, 1986 at pages 100-101)

THE COURT: I want to leave them with exactly the right word before I leave the courtroom. I'll stand on my charge.

(End of discussion at side-bar.)

THE COURT: I'm going to read some more law to you on this subject as the last word on it. I'm going to read it slowly and I'm not going to paraphrase it so that you have the exact law on the subject.

An in-commerce theory requires that the government prove that, one, a substantial volume of interstate commerce is involved with the challenged activity, and, two, the challenged activity is an essential integral part of the transaction. It is inseparable from its interstate aspects. An effect on commerce theory applies to primarily intrastate activity. The government must show that, one, a substantial amount of interstate commerce was involved and, two, the challenged activity has a substantial effect on interstate commerce.

The government may prove the connection between interstate commerce and the challenged activity through either the activities of the target of the anti-trust violation or defendant's activities.

Because the challenged activities in this case are alleged price-fixing, bid-rigging and allocation of territories, which are by themselves determined to be unreasonable violations of the Sherman Act, if, in fact, that was what the defendants did, the government is not required to prove any adverse impact on interstate commerce.

You may take the jury back to the deliberation room.

